

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ADAM DUPUIS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 239315

Saginaw Circuit Court

LC No. 01-020549-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE WOODS, JR.,

Defendant-Appellant.

No. 239316

Saginaw Circuit Court

LC No. 01-020550-FC

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

In Docket No. 239315, defendant Adam Dupuis appeals as of right his conviction on two counts of assault with intent to commit murder, MCL 750.83, and one count each of conspiracy to commit first-degree premeditated murder, MCL 750.316, felony-firearm, MCL 750.227b, carrying a concealed weapon (CCW), MCL 750.227, and discharging a firearm from a motor vehicle, MCL 750.234a. On appeal he raises a double jeopardy violation, a juror misconduct claim, and alleges that he was denied the effective assistance of counsel. Because the record does not support his claims, we affirm his convictions.

In Docket No. 239316, defendant Robert Lee Woods, Jr. appeals as of right his conviction on the same charges. On appeal and in a late filed standard 11 brief he raises several issues related to his sentencing, and challenges the sufficiency of the evidence supporting his convictions. The record reveals that defendant's sentencing guidelines were misscored and his trial counsel was ineffective for failing to object to the error, however we find sufficient evidence to support his convictions. The trial court also erred when it imposed certain consecutive sentences. We affirm and remand for resentencing and correction of the judgment of sentence.

These cases arose from the drive-by shooting of Alex Gomez where defendant Dupuis fired the shot and defendant Woods drove the car. The two defendants were tried together before a single jury, and their appeals have been consolidated. We affirm in Docket No. 239315, and remand in Docket No. 239316 for resentencing and entry of a corrected judgment of sentence.

A. Docket No. 239315

First, defendant argues his convictions of assault with intent to commit murder and discharging a firearm from a motor vehicle constitute double jeopardy. We disagree. A double jeopardy claim presents a question of law that we review de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). But because defendant did not preserve this issue below, our review is limited to plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This identical question was addressed in *People v Rivera*, 216 Mich App 648; 550 NW2d 593 (1996), in which we held that convictions on these charges did not constitute double jeopardy. Defendant concedes that because the decision was issued after November 1, 1990, it presents binding precedent. MCR 7.215(I)(1). Defendant has failed to persuade us that *Rivera* was wrongly decided. Thus, defendant's claim must fail.

Next, defendant asserts the trial court erred in denying his motion for an evidentiary hearing on his juror misconduct claim. We disagree. The decision to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

A jury verdict may be challenged where evidence exists that the jury was exposed to extraneous influences. *People v Budzyn*, 456 Mich 77, 88, 91; 566 NW2d 229 (1997). To establish that extraneous influences presented in jury deliberations created error requiring reversal, defendant must demonstrate (1) that the jury was exposed to extraneous influences and (2) "that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88-89.

Defendant concedes his post-conviction motion asserting juror misconduct was not filed in the trial court within the time provided by MCR 7.208(A) and (B)(1) and defendant knew on the first day of trial that the challenged juror was aware of defendant and his family. Nonetheless, he urges us to remand the case for a hearing on this matter. We decline to do so because first, the questioning on voir dire did not generate the challenged knowledge of defendant because of a lack of specificity in the questioning, and second, the juror acknowledged that she knew of no reason she should not serve. We fail to find juror misconduct. Several eyewitnesses identified defendant as the shooter, and testimony at trial revealed defendant had threatened a companion of the shooting victim on several occasions. In light of this overwhelming evidence of defendant's guilt, we are not convinced the verdict would have been different had the juror not served.

Finally, defendant claims he received ineffective assistance of counsel based on his attorney's decision to call Detective Timothy Fink to testify. We disagree. Whether defendant was denied the effective assistance of counsel is a constitutional question, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was objectively unreasonable, (2) but for counsel's actions the outcome of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.*

Defendant's trial counsel's decisions regarding whether to call certain witnesses are presumed matters of trial strategy, and we will not substitute our judgment for counsel's in matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The fact that defendant was convicted after defense counsel employed this strategy does not constitute ineffective assistance. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

B. Docket No. 239316

First, defendant argues the trial court erred in scoring certain prior record variables (PRVs) and offense variables (OV) in the legislative sentencing guidelines. Defendant waived this issue by indicating at his sentencing hearing that the guidelines had been properly scored. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Generally, waiver extinguishes all error for appellate review. *Id.* But defendant also asserts he received ineffective assistance of counsel because his attorney failed to object to the scoring. Therefore, we will review the issue. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

Because defendant committed these offenses in July 2001, the legislative sentencing guidelines applied. MCL 769.34(2). Defendant challenges the trial court's scoring of PRV 4 (prior low severity juvenile adjudications), which was scored at five points for his assault, CCW, and firearm discharge convictions; PRV 5 (prior misdemeanor juvenile adjudications), which was scored at two points for firearm discharge only; and OV 13 (continuing pattern of criminal behavior), which was scored at twenty-five points for the three offenses at issue.

Defendant contends the trial court misscored PRV 4 and 5 because it concluded defendant had two prior felony-level juvenile adjudications. Defendant's presentence investigation report (PSIR) indicates he had one felony-level and one misdemeanor-level juvenile adjudication. Thus, the trial court erred in scoring PRV 4, which should have been scored at two points. MCL 777.54. But the trial court correctly scored PRV 5 at two points. MCL 777.55.

Defendant also asserts the trial court misscored OV 13 because it counted the actions involved in this case to establish a pattern of criminal behavior. But the trial court could have reasonably concluded from the evidence at trial that defendant committed additional felonious acts against the victims in this case. Therefore, the trial court did not err in scoring OV 13 at twenty-five points. MCL 777.43.

Correcting the trial court's error in scoring PRV 4 changes the minimum sentencing guidelines for all three offenses defendant cited – assault, CCW, and firearm discharge – and his sentences now fall outside the adjusted ranges. We conclude defense counsel provided

ineffective assistance by failing to object to the scoring of PRV 4. We therefore remand for resentencing on these charges.

Defendant joins with his codefendant on the juror misconduct challenge. For the reasons given earlier, we decline the challenge.

Defendant contends the trial court erred in ordering (1) his sentence for CCW to run consecutive to his other sentences and (2) his felony-firearm conviction to run consecutive to his firearm discharge sentence. We agree. Whether consecutive sentencing is statutorily mandated presents a question of law we review de novo. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). The prosecutor agrees the trial court erred in sentencing defendant. Accordingly, we remand this case for entry of a corrected judgment of sentence indicating defendant's felony-firearm sentence runs consecutive to the assault and conspiracy sentences (the predicate felonies for the felony-firearm conviction), while all other sentences run concurrently.

In a late filed standard 11 brief, defendant argues that his convictions should be reversed because the prosecutor did not present sufficient evidence to support his convictions, and/or the verdict is against the great weight of the evidence. Although defendant frames the issue in this manner, substantively, the challenge goes only to the sufficiency of the evidence supporting his convictions. This Court may review challenges to the sufficiency of the evidence regardless of whether the issue was raised before the trial court. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of the offense were proven beyond a reasonable doubt. *Wolfe, supra*, 440 Mich 515; *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

After reviewing the record, we find that when viewed in a light most favorable to the prosecution, there was sufficient evidence in this case for a reasonable jury to find defendant guilty beyond a reasonable doubt of both counts of assault with intent to commit murder, MCL 750.83, conspiracy to commit first-degree premeditated murder, MCL 750.316, felony-firearm, MCL 750.227b, carrying a concealed weapon (CCW), MCL 750.227, and discharging a firearm from a motor vehicle, MCL 750.234a. Therefore, defendant's sufficiency challenge fails.

Defendant also alleges in his standard 11 brief that he received ineffective assistance of counsel in the trial court. We disagree. Defendant first argues that his counsel was ineffective for not using information provided by defendant to impeach witness testimony. Decisions regarding what evidence to present and whether to question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not substitute our judgment for counsel's in matters of trial strategy.

Defendant also argues that he was denied the effective assistance of counsel because his counsel failed to object to his improperly scored sentencing guidelines. As we concluded *supra*, defendant was denied the effective assistance of counsel in this respect, and we are remanding the case for resentencing. Likewise, defendant contends his counsel was ineffective for failing to

object to the improper imposition of consecutive sentences. Again we do find this error, and are remanding the case for entry of a corrected judgment of sentence.

Affirmed in Docket No. 239315; affirmed and remanded for resentencing and entry of a corrected judgment of sentence in Docket No. 239316. We do not retain jurisdiction.

/s/ Pat M. Donofrio

/s/ David H. Sawyer

/s/ Peter D. O'Connell